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Policymaking and Politics in the Federal District Courts

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POLICYMAKING AND POLITICS IN THE FEDERAL DISTRICT COURTS. By *Robert A. Carp* and *C.K. Rowland.* Knoxville: University of Tennessee Press. 1983. Pp. x, 203. $17.95.

This book explores what must be one of the least provocative or controversial questions in contemporary American politics. The question posed by its authors[1] is whether, and to what extent, "extralegal cues"[2] affect the decision making of federal district judges. That is, do federal trial judges reach decisions solely by applying appropriate legal precedent to the facts of the case, or do they permit such factors as party affiliation and personal beliefs to intrude on and poison their pristine legal analysis?

It cannot be gainsaid that politicians routinely operate on the assumption that judges are unable (or unwilling) to divorce their politics from their decisions. Try to imagine, for example, the following preelection exchange between President Reagan and the Reverend Jerry Falwell:

Reverend Falwell: "Mr. President, I understand that you have 100 district court vacancies to fill. To assist you in this task, I have assembled a list of the most qualified conservative candidates. Appoint these men, and those activists presently sitting on the federal bench will no longer be able to stifle your political agenda."

President Reagan: "Well . . . thank you Jerry. I appreciate your efforts in constructing this impressive list of conservative legal talent. Unfortunately, I have serious reservations about accepting your list. You see, no one has *proven* that the actual decisions of conservative judges are any more conservative than those of liberal judges. If I accept your list, and it turns out that there is no correlation between judicial decisions and 'extralegal cues,' I will have needlessly invited intense political criticism and jeopardized my reelection chances. If I'm going to face this political heat, I need to be absolutely certain that judicial decisions *are* affected by the judges' politics. Before accepting your list, Jerry, I think the wisest course is to commission a study on the subject."

Certainly, it is difficult to believe that President Reagan would commission a study to confirm what is intuitive to most. Whatever the book's genesis, our authors begin with the "traditional" theory that judicial decisions are solely the function of legal precedent.[3] Under

1. Robert A. Carp is Associate Professor of Political Science at the University of Houston. Claude Rowland is Assistant Professor of Political Science at the University of Kansas.

2. As the words suggest, "extralegal cues" are those factors extraneous to the legal issues involved in a case. With reference to the district court judge, extralegal cues include the judge's political affiliation, home state, appointing president, and so forth. Pp. 4-7.

3. The authors attribute this theory of judicial decision making to "traditional legal schol-

this "traditional" conception of judicial decision making, the role of the judge is limited to fitting mechanically the facts of a given case to the prevailing legal guidelines. The ideal result is a fair-minded decision uncontaminated by the judge's own political values, attitudes or prejudices.

In order to test this romantic notion of judicial even-handedness, the authors conducted a massive array of statistical studies. These studies purport to show the actual effects of various "extralegal cues" on federal trial court decisions (p. 23). The data base consists of 27,772 district court opinions published in the *Federal Supplement* over a forty-five year period.[4] The cases are divided neatly into five case types: Criminal Justice, Government and the Economy, Support for Labor, Class Discrimination, and First Amendment.[5] Each opinion issued in one of these five areas is characterized as either "liberal" or "conservative" depending, not surprisingly, on the outcome.[6] By distinguishing between "liberal" and "conservative" decisions and controlling for various "extralegal cues," the authors hope to demonstrate the precise amount of "liberalism" or "conservatism" that can be explained by nonlegal factors. Each chapter introduces one or more extralegal factors, hypothesizes its probable effect on judicial decision making, and tests its effect statistically.[7] The final two chapters attempt to synthesize the authors' initial conclusions and to suggest possible areas for follow-up research.

The authors' most interesting findings relate to two of their suggested extralegal cues: the judge's political party affiliation and the identity of the president who appointed the judge. The authors begin with two premises. First, they surmise that, all other things considered, Democratic judges will issue a greater percentage of liberal decisions than their Republican counterparts. Second, they predict that judges appointed by more "liberal" presidents will produce more "liberal" opinions.

Not surprisingly, the authors discover that their data support each of these bold assertions. What is interesting about the results, how-

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ars," but fail to name any of these individuals. Pp. 5-6. It is therefore unclear whether the authors are alluding to scholarly descriptions of the *ideal* judicial system, or to legal scholars who have actually suggested that judges are able to divorce their personal attitudes from their judicial decisions.

4. To control for the effects of extralegal cues over time, the authors divide the study into three periods of approximately equal judicial activity: 1933-1953, 1954-1968, 1969-1977.

5. Dividing the data into types of cases permits the authors to control for the factor of case content. This is necessary because certain case types are naturally more "political" than others.

6. For example, in the criminal justice category, a decision in favor of the defendant is categorized as "liberal." P. 19.

7. Chapter 2 examines the influence of political party affiliation. Chapter 3 discusses the impact of the appointing president. Chapter 4 measures the effect of region, circuit and state. Chapter 5 investigates the relevance of district court size and the level of urbanization in the city in which the judge presides.

ever, is that the effects of these extralegal cues on judicial decision making are far from uniform. For example, while Democratic judges did issue a greater quantity of "liberal" decisions from 1933-1977, they did so with far greater frequency in the 1969-1977 period than in the earlier years. Moreover, while district judges did reflect the political values of their appointing presidents, they were far more faithful to presidential politics when appointed by Lyndon Johnson or Richard Nixon than by Harry Truman, John Kennedy or Gerald Ford.

The heightened significance of political party affiliation in the 1969-1977 period, the authors argue, is largely attributable to the inconsistent pronouncements of the Burger Court (p. 37). The authors theorize that when the Supreme Court supplies firm guidelines and clear legal precedents, the judges in the lower federal courts have less discretion in deciding cases. They must suppress their own political beliefs and follow the clear standards articulated by the high court. Conversely, when the judges are left without guidance, they are free to interject their personal beliefs into the decision-making process. The rise in political decision making can therefore be seen as a function of a greater opportunity to politicize, rather than a greater desire to do so.

Opportunity is likewise the essential factor in determining the degree to which a district judge will reflect his appointing president's political values. Here, however, it is *presidential* opportunity that is at issue. While most presidents would probably like to appoint obedient judges,[8] their ability to do so is often circumscribed. Such factors as the number of district court vacancies, the need for bipartisan compromise,[9] and the judicial climate[10] will determine the extent to which the president can assure a dependable judiciary.

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8. The authors argue that some presidents are more concerned than others with nominating judges who share their own political orientation. Harry Truman, it is argued, was less concerned with appointing ideologues than with rewarding those who had remained personally loyal to him in his presidential campaign. P. 54. One suspects, however, that many of those who steadfastly supported Truman's campaign also shared his political beliefs. The authors' failure to account for this possibility makes it difficult to accept their explanation for why Truman's judicial appointees exhibited only minimal fidelity to his political agenda.

9. In order for the president to succeed in placing politically supportive judges on the federal bench, he must first succeed in having his appointments confirmed by the Senate. In this section of the book, the authors do an excellent job of describing the difficulties a president often encounters in dealing with influential, recalcitrant senators. Here, the authors describe the tradition of "senatorial courtesy," which often permits a senator to block the confirmation of nominees to offices in the Senator's home state. P. 60. If the president is too weak politically to confront those senators opposed to his nominations, he will be unable to secure a faithful judiciary.

10. The judicial climate at the time of the appointment can easily frustrate the president's attempt to mold the federal judiciary. Pp. 62-64. Suppose, for example, that a president undertakes to nominate a host of conservative district court judges to a federal judiciary dominated by liberals. Those nominees who dare depart from the prevailing legal norms run a high risk of having their decision overturned. Accordingly, they are forced to restrain their personal beliefs if they are to coexist within a judiciary hostile to their ideologies.

The authors' ability to proffer cogent explanations for their statistical findings is undoubtedly the major strength of their work. To be sure, many of their proposed explanations are unsubstantiated. For instance, they simply conclude that Burger Court pronouncements have been more ambiguous than those of prior Courts. Although this may well be in accord with the perception of contemporary legal scholars, the authors make no attempt to substantiate the claim. This weakness is overshadowed, however, by the enlightening and amusing chapter on presidential appointments. Here the authors provide numerous anecdotes that illustrate the limitations on the president's ability to appoint judicial automatons.[11] While these anecdotes fall short of "proving" the authors' assertions, they raise thought-provoking arguments that can be explored in future works. Just as importantly, they provide a needed respite from the endless stream of percentages and correlation coefficients that dominate the authors' work.

In the end, unfortunately, there are too few of these thought-provoking illustrations. The bulk of the authors' work consists of presenting statistical tables and describing the detailed numerical conclusions embodied in those tables. After seven chapters the reader is so overwhelmed by the sheer magnitude and variety of statistical studies that he is incapable of distinguishing one from the other. This appendix-like format might be useful to those courageous few who envision using this book as a handy reference tool. It may also serve to allay presidential fears that their judicial appointees will shun personal beliefs in favor of strict adherence to legal precedent. The book offers little, however, to that occasional reader desiring a glimpse at our judicial system. The provocative title, *Policymaking and Politics in the Federal District Courts,* suggests a book that will probe into the human elements of decision making in our federal courts. Instead, the book responds with an uninspiring conglomeration of numbers that leaves the reader with the unfortunate impression that district court decisions are reached by plugging the judge's biographical data into a computer.

11. One of the more interesting anecdotes relates to President Kennedy's efforts to appoint Thurgood Marshall to the federal bench. In order to secure Marshall's confirmation, Kennedy was forced to compromise with Senator James Eastland, the conservative chairman of the Senate Judiciary Committee. Allegedly, the price for Marshall's confirmation was the appointment of Senator Eastland's college roommate, William Harold Cox, to a district judgeship in Mississippi. As a district judge, Cox was openly hostile to civil rights cases; on one occasion he purportedly referred to black litigants as "niggers." The great irony, of course, is that Cox was appointed by a liberal president widely regarded as a champion of civil rights. Pp. 59-60.